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No. 81

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA, APPELLANT

v.

[illegible] MEDINDEZ SANCHEZ AND ARMAND MORA, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, APPELLANT

v.

MRS. MARIA MELITONA SANCHEZ AND ARMAND MOTA, APPELLEES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States, plaintiff-appellant, submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction to review on direct appeal the judgment of the District Court entered in this cause.

OPINION BELOW

The District Court for the Northern District Illinois rendered no opinion on granting the judgment appealed from. A transcript of the proceedings at the trial preceding entry of the judgment, and showing that the judgment rested entirely and solely on constitutional grounds, is contained in the Appendix.

JURISDICTION

The judgment of the District Court was entered on March 28, 1950. The petition for appeal was presented to Mr. Justice Minton on April 27, 1950, and was allowed on that date. The juris-

diction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C., Sec. 1252. The jurisdiction of the Supreme Court to review this judgment on direct appeal is sustained by *United States* v. *Rompel*, 326 U. S. 367.

QUESTION PRESENTED

Whether the tax imposed upon the transfer of marihuana under Section 2590 (a) (2) of the Internal Revenue Code is unconditional.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 2590. TAX.
>
> (a) *Rate.*—There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:
>
> (1) *Transfers to special taxpayers.*—Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.
>
> (2) *Transfers to others.*—Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.
>
> (b) *By Whom Paid.*—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that

the transfer is made in violation of section 2591 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

* * * * *

[26 U. S. C. 1946 ed., Sec. 2590.]

SEC. 2591. ORDER FORMS.

(a) *General Requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

[26 U. S. C. 1946 ed., Sec. 2591.]

SEC. 2593. UNLAWFUL POSSESSION.

(a) *Persons in General.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

* * * * *

[26 U. S. C. 1946 ed., Sec. 2593.]

STATEMENT

This suit was brought by the United States in the United States District Court for the Northern District of Illinois for the recovery of $8,701.65 alleged to have been duly assessed against the defendants on February 27, 1943.

The defendants' answer denied that the assessment was lawfully made and alleged that they were not indebted to the United States. For a further defense it was alleged that the cause of action stated in the complaint was barred by the statute of limitations.

The case came on for trial on March 28, 1950, and at the opening of the trial the defendants moved to dismiss. This motion was predicated upon the sole ground that Section 2590 (a) (2) of the Internal Revenue Code, *supra*, under which the tax was assessed, was unconstitutional, and in support thereof defendants relied on *Tovar* v. *Jarecki*, 173 F. 2d 449 (C. A. 7). The District Court granted the motion of dismissal, and a minute order was entered sustaining the motion and granting judgment to the defendants.

THE QUESTION IS SUBSTANTIAL

In *Tovar* v. *Jarecki*, *supra*, the Court of Appeals for the Seventh Circuit held that the tax imposed by Section 2590 (a) (2) of the Internal Revenue Code, *supra*, was a penalty similar to that struck down in *Lipke* v. *Lederer*, 259 U. S. 557, which involved the taxing provisions of the National Prohibition Act, c. 85, 41 Stat. 305. The latter Act prohibited the sale of intoxicating

beverages and, in addition to the ordinary criminal penalties for its violation, provided that, upon evidence of illegal manufacture or sale, there could be assessed and collected from the guilty person a tax in double the amount provided in the case of legal manufacture. This Court held that the exaction involved in the *Lipke* case was clearly a penalty and not a tax, and that the imposition of such a penalty without trial violated the due process clause.

The tax here involved, which is imposed upon the transfer of marihuana by Section 2590 (a) (2) of the Internal Revenue Code, is clearly an excise tax. There is no criminal liability attaching to the transfer of marihuana. The statute simply provides a tax, in the case of a transfer to a licensed person, of one dollar per ounce and, in the case of a transfer to an unlicensed person, one hundred dollars per ounce. Section 2593 of the Internal Revenue Code, *supra*, imposes criminal penalties for failure to pay the tax, but it is the failure to pay the tax that gives rise to the criminal liability; and not, as in *Lipke* v. *Lederer*, *supra*, the criminal liability which creates the tax obligation.

In the *Tovar* case, the Court of Appeals for the Seventh Circuit placed heavy reliance on the fact that, if the taxpayer had been a licensed transferee under the statute, the tax upon a transfer to him would have only been one dollar an ounce but, as an unlicensed transferee, he was assessed one hundred dollars an ounce. From

this disparity in rates the Court of Appeals concluded that the statute was not a revenue raising measure but one designed to create a deterrent upon the activity taxed.

This Court has not regarded such disparity in the tax rate as constituting a basis for invalidation of the tax. In *McCray* v. *United States*, 195 U. S. 27, 61, the Court upheld a tax upon colored oleomargarine which was forty times the amount of the tax on uncolored oleomargarine, and pointed out that even though the effect of the tax was to repress the manufacture of colored oleomargarine, it was not within the power of the Court to dictate to Congress how the conceded power to tax should be exercised.

A similar assault upon Section 2 of the National Fire Arms Act of June 26, 1934, c. 757, 48 Stat. 1236 (26 U. S. C. 1946 ed., Sec. 1132), which imposes a two hundred dollar annual license tax upon dealers in certain types of fire arms, was rejected in *Sonzinsky* v. *United States*, 300 U. S. 506. In upholding that tax, the Court said (p. 513):

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, *United States* v. *Doremus*, *supra*, 93, 94; *Nigro* v. *United States*, 276 U. S. 332, 353, 354; *License Tax Cases*, *supra*; see *Child Labor Tax Case*, *supra*, 38; and it has long been established that

an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27, 60–61; cf. *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48.

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. *Veazie Bank* v. *Fenno*, *supra*; *McCray* v. *United States*, *supra*, 56–59; *United States* v. *Doremus*, *supra*, 93–94; see *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44, 45; cf. *Arizona* v. *California*, 283 U. S. 423, 455; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 210; *Weber* v. *Freed*, 239 U. S. 325, 329–330; *Fletcher* v. *Peck*, 6 Cranch. 87, 130. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray* v. *United States*, *supra*; cf. *Magnano Co.* v. *Hamilton*, *supra*, 45.

Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national

taxing power. *Alston* v. *United States*, 274 U. S. 289, 294; *Nigro* v. *United States*, *supra*, 352, 353; *Hampton & Co.* v. *United States*, 276 U. S. 394, 411, 413.

In *Nigro* v. *United States*, 276 U. S. 332, the Court upheld the Anti-Narcotic Act (c. 1, 38 Stat. 785, as amended by Section 1006 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1130), which was similar to the statute here involved in regulating the transfer of narcotics except that it does not contain any provision for tax upon transfers to unauthorized persons.

The effect of the ruling below, if allowed to stand, is to remove all criminal sanctions upon the possession or transfer of untaxed marihuana. The only crime defined by federal law with respect to marihuana is the possession or transfer of untaxed marihuana. If the tax imposed is a penalty, then the crime of possessing non-tax-paid marihuana no longer exists.

The decision of the district court in this case, and that of the Court of Appeals in the *Tovar* case, are in conflict with *United States* v. *Doremus*, 249 U. S. 86; *McCray* v. *United States*, *supra*; *Nigro* v. *United States*, *supra*; *Sonzinsky* v. *United States*, *supra*.

The question presented by this appeal is a substantial one and of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 27, 1950.

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